No. 92-1482

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ERIC J. WEISS and ERNESTO HERNANDEZ,

Petitioners,

v.

UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF MILITARY APPEALS

REPLY BRIEF OF PETITIONERS

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The most notable feature of respondent's brief is its failure to address several of petitioners' key points. Thus, respondent refuses to confront the fact that only military judges may perform certain functions in the military justice system, which substantially undermines its "germaneness" argument, and it fails to acknowledge that, outside the military, virtually every judge who presides at felony trials and sits on appeals from them has a fixed term of office, a consensus that this Court has found highly significant in Due Process cases. In addition, respondent offers no justification for the absence of *any* term of office, other than to indicate that very long terms might be problematic. And, perhaps most significantly, it makes virtually no effort to defend the role that the Judge Advocate General of each service plays in both the appointment and removal of all military judges, a problem that we highlighted in the final section of our opening brief. In Points I and II we address these failures,

as well as the few new arguments that respondent raises.

The one major new point raised -- the *de facto* officer defense -- was not mentioned in respondent's opposition to certiorari, nor in its brief in the Court of Military Appeals, and hence is not properly before this Court. Nonetheless, we respond to it in Point III because the Court of Military Appeals has recently applied the doctrine to uphold a conviction in a Coast Guard case in which it found an Appointments Clause violation. *United States v. Carpenter*, 37 M.J. 291 (C.M.A. 1993). In reaching that result, which would presumably be binding on petitioners on remand from this Court, that court devoted only one sentence to discussing its conclusion, and cited a single case, *Buckley v. Valeo*, 424 U.S. 1 (1976), which was an action to enjoin the operation of a statute, not, like this case, a criminal proceeding in which the defendants have received very serious sentences. *Carpenter*, 37 M.J. at 295. Accordingly, this reply explains why the *de facto* officer doctrine, which has never been applied to uphold a criminal conviction in a case remotely resembling this one, cannot be relied upon to sustain petitioners' convictions.

In addition, respondent has claimed, in effect, that the military justice system will come to a halt if the Appointments Clause argument (but not the Due Process argument) is decided adversely to it. There are a number of practical reasons why such predictions are vastly overstated, including the fact that even *Griffith v. Kentucky*, 479 U.S. 314 (1987), does not require that every defendant whose conviction is still on direct appeal will automatically be able to overturn both the conviction and the sentence. Nonetheless, we urge the Court *not* to reach those other issues, because other defendants, whose cases involve different facts and whom petitioners' counsel do not represent, are not before the Court.

I. THE UNIQUE FUNCTIONS PERFORMED BY MILITARY JUDGES REQUIRE THAT THEY BE SPECIFICALLY APPOINTED TO THEIR POSITIONS.

Respondent's brief makes clear that the difference between the parties on the Appointments Clause issue turns almost entirely on the meaning of "germaneness" as applied to the new duties that can be added to the holder of an existing office. Thus, the government has again specifically rejected the argument, adopted by the swing vote below, that military judges are not subject to the Appointments Clause. US Br. 10 n.4. Nor does the United States defend the rationale offered by the plurality below who, relying on *Shoemaker v. United States*, 147 U.S. 282 (1893), argued that the functions of military judges were sufficiently germane to those of the former "law officers," whose places they took, that no new appointment was needed. It was in response to that argument that petitioners directed most of their discussion of *Shoemaker* in their opening brief at 17-18.

To defend the current system, respondent begins with a proposition with which we do not disagree: that new duties may be assigned to the holder of an existing office, and no new appointment is required, so long as those new duties are "germane" to the old ones. Thus, for instance, if the duties of federal magistrate judges were increased to allow them to decide issues relating to attorneys' fees, where previously only district judges could do so, no one would suggest that the Appointments Clause would be triggered by that change since those new duties are plainly germane to the old ones. Our difference with the government is over the scope of the germaneness rule, in particular, whether, as the government contends, the duties of military judges are "germane" to the duties of *all* military officers -- not simply those who are trained in the law and designated judge advocates -- so that any military officer, even those who are not members of any Bar, can be "assigned" the duties of a military judge without

further regard to the Appointments Clause.[1]

Respondent's argument -- that any military officer can serve as a military judge -- demeans judicial offices, both inside the military and out, and would almost certainly be rejected out of hand in the civilian context. But even within the military, there are two principal reasons why it cannot be accepted: (1) this approach to germaneness obliterates all limitations on that term, thereby substantially undermining the reasons behind the Appointments Clause, and (2) Congress and the Navy have "assigned" military judges in ways that are directly contrary to such an expansive interpretation of germaneness. Underlying both of our arguments is the fact that Congress has assigned military judges functions that no other persons in the military can perform, which is the strongest evidence of the fact they hold offices separate from those of all other military officers.

According to respondent, all military officers, whatever their military expertise, have judicial or "quasi-judicial" duties, and so "assignment" to them of the duties of a military judge is nothing out of the ordinary. The principal difficulty with this argument is that almost all of the examples cited by respondent on pages 14-17 of its brief fall

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[1]Even this explanation does not justify the fact that under UCMJ Art. 66(a), 10 U.S.C. § 866(a), civilians may be appointed to the Courts of Military Review, as the Coast Guard has long done, and the Navy has done in the past. Respondent argues (Br. 19) that, since no civilians sat on petitioners' cases, the issue of civilian appointments is not before the Court. But petitioners' argument regarding civilians was offered principally to show that Congress surely could not have had the "germaneness" justification offered by the government in mind since that rationale could not apply to civilians. The use of civilians also undermines the claim made at the top of page 13 of respondent's brief that there has been a legislative judgment that reappointment is not necessary, a contention that, we also note, is unsupported by any citation to a statute or legislative history.

into the "quasi-judicial" rather than the "judicial" category, as its brief itself acknowledges.[2] Many of those functions that do relate to the criminal process involve investigations, detention, or apprehension, and are not truly "judicial" functions as that term is commonly understood. Most may be performed in the civilian system by police or other law enforcement personnel, rather than by judges. Some of the functions relate to post-conviction review by the convening authority or participation in clemency or other similar review, neither of which is ordinarily thought of as judicial in nature. And a number of the investigative functions cited by respondent, to the extent that they are not carried out by staff lawyers, are not criminal in nature, and thus cannot support a claim that military judges, who preside over general and special courts-martial, are no different from all other military officers.

One example cited by respondent illustrates how far its argument goes. To support its claim of germaneness, the government notes that "[a]ny commissioned officer on active

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[2]The use of "quasi" calls to mind Justice Jackson's observation about the use of that term in his dissent in *Federal Trade Comm'n v. Ruberoid Co.*, 343 U.S. 470, 487-88 (1952): "The mere retreat to the qualifying 'quasi' is implicit with confession that all recognized classifications have broken down, and 'quasi' is a smooth cover which we draw over our confusion as we might use a counterpane to conceal a disordered bed." Similarly, Bryan A. Garner, *A Dictionary of Modern Legal Usage* 457 (1987), quotes *Corbin on Contracts* 27 (1st ed. 1952) on the term "*quasi*" as follows: "The term *quasi* is introduced as a WEASEL WORD that sucks all the meaning *of* [read *from*] the word that follows it; but this is a fact that the reader seldom realizes." Or, as the Solicitor General remarked with respect to the Latin phrase "de facto," it "is perhaps best translated as 'not really.'" Brief for the United States as *Amicus Curiae* in *Morales v. Trans World Airlines, Inc.*, No. 90-1604, and *Attorney General of California v. Trans World Airlines, Inc.*, No. 90-1606, October Term 1991 at 17.

duty is qualified to serve as a court-martial member. Art. 25(a), UCMJ, 10 U.S.C. 825(a)." US Br. 14-15. But, under the UCMJ, service on a court-martial panel is analogous to service as a civilian juror not as a judge, which hardly supports the government's germaneness argument for military judges. Moreover, subject to certain limitations, Article 25(c) also allows enlisted personnel to serve on court-martial panels, yet they are obviously not appointed as officers of the United States under the Appointments Clause. Therefore, service as a member of a court-martial cannot be equated with being an officer under the Appointments Clause, let alone a military judge, but is based on the fact of being in the military, as is true for so many other of the investigatory, supervisory, and pre-trial examples relied on by respondent.

Where respondent errs is not so much in categorizing the examples in its brief as functions that judges might perform, but in failing to recognize that there are many functions performed by military judges that no one else in the military is authorized to handle. Thus, only a military judge can preside at a general court-martial, make binding rulings of law on questions of the admissibility of evidence, and instruct the court-martial members on the applicable substantive law governing the offense charged. Yet under respondent's theory of germaneness, *any* commissioned military officer could perform those functions, whether that person was a lawyer, an infantry officer, a civil engineer, a doctor, or a chaplain. And if one were to rely on respondent's court-martial membership analogy, perhaps enlisted personnel, some of whom have never finished high school, could also serve in that capacity.[3]

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[3]Special courts-martial are virtually always presided over by a military trial judge. The UCMJ does allow a special court-martial to be held without a military judge, but in that event a bad conduct
(continued...)

The other powers that only military trial judges may exercise are to act as the sole deciding authority on the guilt or innocence of an accused and to impose punishment, up to life imprisonment, in cases in which the trial is before a judge alone. To be sure, other officers, as well as enlisted personnel and warrant officers, may determine guilt or innocence and impose punishment, but they do so, much like civilian juries, as part of a collective process, not entirely on their own, which only military trial judges can do. UCMJ Art. 16, 10 U.S.C. § 816. This awesome power to decide the fate of an accused, which was added in 1968 as part of Congress' effort to increase the professionalism of military judges, and the authority to issue binding legal rulings, which was also added that same year, are the principal reasons why the government's attempt to lump military judges together with all other military officers must be rejected.

Second, respondent's interpretation of *Shoemaker* is flawed because both Congress and the Navy, in fact, treat the offices of military judges as quite separate and distinct from those held by others in the military. Thus, in UCMJ Art. 26(b), 10 U.S.C. § 826(b), Congress has established special educational and certification requirements for military trial and appellate judges, signalling its view that their functions should not be performed by ordinary military officers, even those trained in the law (military trial judges must be "certified to be qualified for duty as a military trial judge by the Judge Advocate General of the armed force of which such military judge is a member"). While we do not contend that the presence of "congressionally mandated standards above and beyond being an officer . . . ipso facto require[s]" reappointment under the Appointments Clause (US Br. 18

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[3](...continued)
discharge cannot be imposed unless the absence of a military judge was due to "physical conditions or military exigencies." UCMJ Art. 19, 10 U.S.C. § 819.

n.9), these special qualifications are one factor that must be considered in determining whether a separate office has been created, and therefore a separate appointment is required. It also serves to distinguish the command positions for which no new appointment is required cited by respondent on page 17 of its brief.

Furthermore, as we explained on pages 19-20 of our opening brief, but which the government wholly neglects in its brief, the Navy itself treats its judicial offices separately from the rest of even the legal branch of the Navy, as demonstrated by the special board that it has created to recommend that officers be selected as military judges, by their separate oath of office, and even by separate certificates of appointment to that separate office, copies of which were reproduced in Addendum B to our opening brief. Indeed, for someone serving as a general court-martial judge, Congress has specified that he may only take on "duties of a judicial or non-judicial nature other than those relating to his primary duty" with the approval of the Judge Advocate General or his designee. UCMJ Art. 26(c), 10 U.S.C. § 826(c). While respondent has labored mightily to treat appointments as military judges as mere "assignments" of additional duties within the military, it is plain that both the functions performed by military judges and the different treatment accorded military judges by Congress and the Navy make it constitutionally impermissible to equate the duties of military judges with those of all other military officers.[4]

Finally, the expansive view of germaneness urged by respondent and adopted by the Court of Military Appeals would seriously undermine the purposes of the Appointments Clause, which are to assure accountability and to prevent the

[4]Even respondent's attempt to use the term "assignment" to avoid the Appointments Clause failed because note 20 on pages 43-44 in the Due Process section of its brief used the term "appointed," or some variation thereof, no less than five times.

diffusion of power. In our opening brief, we gave examples of reassignments that would apparently be perfectly proper under the government's interpretation (pp 23, 25). In its response (Br. 20-21), the government relies largely on statutory distinctions among the various offices, but never backs away from the constitutional implications of its expansive germaneness test. Indeed, as we read the government's brief, in particular the examples of germaneness on which it relies, it would be constitutionally unobjectionable for the President to reassign the Secretary of Defense to the position of Attorney General, and vice versa, since both have law related duties, and since both have responsibilities relating to the defense of our country. And given the partial overlap of functions between the Army Corps of Engineers and the Environmental Protection Agency, it seems likely that the Secretary of the Army and the Administrator of EPA could fulfill each other's duties under this test of germaneness.

For all of these reasons, as well as those set forth in our opening brief, the appointment of the military trial and appellate judges who heard petitioners' cases did not meet the requirements of the Appointments Clause.

II. RESPONDENT HAS FAILED TO OFFER ANY JUSTIFICATION FOR THE LACK OF ANY FIXED TERM OF OFFICE FOR MILITARY JUDGES.

The principal difficulty with respondent's Due Process argument is what it does not say. Thus, a central theme of petitioners' argument was that the military justice system is unique among criminal justice systems in the United States, both federal and state, as well as for most other adjudicative functions under federal law, because its judges serve at the pleasure of a superior officer. Pet. Br. 27-28, 42-43. This Court has often looked to the consensus of federal and state systems in deciding whether Due Process imposes a particular requirement, as it did in *Medina v. California*, 112

S.Ct. 2572, 2577-78 (1992), on which respondent places principal reliance. US Br. 7, 27-29. Yet nowhere in its brief does the government attempt to justify this gross deviation from the norm that prevails in every criminal justice system in this country that has jurisdiction remotely resembling the power of general and special courts-martial.

For petitioners here, like the petitioner who was tried by the District of Columbia court system in *Palmore v. United States*, 411 U.S. 389, 410 (1973), the absence of an Article III judge does not deprive them "of due process of law under the Fifth Amendment any more than the trial of the citizens of the various States for local crimes by judges without protection as to [life] tenure deprives them of due process of law under the Fourteenth Amendment." But, like the petitioner in *Palmore*, these petitioners should be entitled to no less protection than "the citizens of the various States" would have when tried "for local crimes," such as larceny and cocaine distribution for which petitioners Weiss and Hernandez were tried. Stated another way, if Mr. Palmore had been tried before a judge with no term of office, and had his appeal decided by judges who also had no protection against immediate removal, he surely would have had a meritorious Due Process claim. For the same reason, petitioners have established a Due Process violation here, unless there is something about the military justice system that warrants this very significant reduction in the rights of an accused, an issue to which we now turn.[5]

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[5]At one point respondent suggests that military judges really have nothing to fear because, if they lose their judicial appointments, they still have their military office, with no loss of pay (US Br. 33), as if a wrongful removal of an Article III judge could be remedied by payment of money damages. At other places, the government recognizes the real possibility of improper influence on military judges, and it trumpets at length the alternative protections that are supposed to substitute for fixed

(continued...)

The most startling aspect of the Due Process portion of respondent's brief is that it nowhere attempts to explain how military functions would be impaired by fixed terms of office for trial and appellate judges. It does argue that assigning judges "for a long fixed period" would create problems (US Br. 31), but petitioners have never asked for any such rule ("the needs of the military might preclude lengthy terms of office, but that hardly justifies the absence of any term of office at all." Pet. Br. 31). But even that argument is largely based on the need for frequent reassignment to give junior officers a variety of experience, and thus would have no relevance for judges on the Courts of Military Review, who are generally at or near the end of their careers, or, for that matter, for most military trial judges either. Other than that, respondent has offered no reason why there should not be judicial terms of office, other than the fact that the military has never had them.[6]

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[5](...continued)
terms of office. *Id.* at 42-48. Those two positions are basically inconsistent, but the latter is more pertinent because it recognizes that protections are needed so that judges do not tailor their rulings to avoid being transferred to an undesirable place as a punishment for performing in a manner disapproved by their superiors.

[6]Respondent makes much of the fact that the lack of tenure for military judges has existed for over 200 years. US Br. 34-38. Quite apart from the fact that past history alone is never dispositive of Due Process challenges (Pet. Br. 41), that argument overlooks the fact that there were no offices in the military analogous to those now held by military judges until 1968, when the UCMJ was amended to establish the offices of military trial and appellate judges. *Cf. Connecticut v. Doehr*, 111 S.Ct. 2105, 2123 (1991) (Scalia, J., concurring, applying test in *Mathews v. Eldridge*, 424 U.S. 319 (1976), since practice at issue not recognized at common law). And under the pre-1968 system, there were no persons in civilian life who were performing analogous functions to those who

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Respondent's principal defense of the practice, under which military judges serve essentially at the pleasure of their service's Judge Advocate General, is its plea for deference. US Br. 25-26, 29-32, 38. Assuming that some deference is owed to Congress on this issue, deference is not simply a blind command to follow, but is, instead, an obligation to proceed with caution before overturning *reasons* given by Congress for doing something different in the military than in civilian life. The difficulty here is that respondent has been unable to cite any justification offered by Congress for the absence of *any* term of office, and even its brief contains none.

In fact, there is no evidence that Congress ever gave this issue a moment's attention in 1968 or at any other time when it legislated with respect to judicial appointments in the military. There is not a word in the UCMJ that addresses this issue specifically, nor is there any indication in the legislative history that Congress considered, and then rejected, the idea of fixed terms for military judges. After 1968 the issue came before Congress only when a Defense Department commission issued a report on the issue, but Congress simply did nothing in response to it (US Br. 30-32), a decision equally consistent with any number of alternatives besides Congressional approval. *See Johnson v. Transportation Agency*, 480 U.S. 616, 671-72 (1987) (Scalia, J., dissenting). Accordingly, the deference argument fails both because there is no indication that Congress considered the term of office issue in creating the office of military judge in 1968, and because there is no explanation by Congress or the Executive Branch of *why* relatively short fixed terms of office are incompatible with the legitimate

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[6](...continued)
served as a "presiding officer" at a military court-martial (US Br. 34).

needs of the military.[7]

There is another aspect of petitioners' Due Process argument that respondent has also largely side-stepped. As explained in Point III of our opening brief, the Due Process violation results not simply from the absence of a term of office for military judges, but also from the fact that the power of removal is lodged in the Judge Advocate General of their service, rather than in a high ranking civilian. As the person responsible for his service's military justice system, including the prosecutors of those accused of violating the UCMJ, the Judge Advocate General has a special interest in the outcome of courts-martial that is not shared by other senior military officials. In addition, his proximity to the military justice system, unlike other senior officials who have many other responsibilities, means that he is more likely to hear complaints about military judges and to respond to them than the Secretary of the Navy or the President would be if only they had the power to remove military judges. In other words, while the largely

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[7]If Congress had actually considered the issue, and decided upon a fixed term of office, it *would* be entitled to deference with respect to the period of time chosen, both because the fixing of a period would necessitate consideration of other periods, and because Congress would inevitably have to balance the various factors deemed relevant in making that judgment. If our position is sustained on this issue, it will be up to Congress to make that judgment in the first instance, and given the deference to which that judgment would be entitled, the difficulties suggested by respondent (US Br. 30) would not arise. We also cannot let pass the government's suggestion (Br. 31-32) that the addition of UCMJ Art. 6a, 10 U.S.C. § 806a, in 1989, was the result of the work of the 1984 Commission that considered the lack of tenure for military judges and that somehow Art. 6a was the compromise. That provision was enacted in response to the decision in *U.S. Navy-Marine Corps Court of Military Review v. Carlucci*, 26 M.J. 328 (C.M.A. 1988), and not the Commission's efforts.

unencumbered power of removal is a Due Process violation on its own, the fact that the power is vested in the Judge Advocate General of each service vastly compounds the problem. Thus, even if there might be some reason not to have fixed terms of judicial office -- a proposition that we reject -- there would still be no justification for reposing in the Judge Advocate General the responsibility for assigning and reassigning military judges. And while, as respondent points out (Br. 45), military judges have to be accountable to *someone*, that does not explain why that person must be the Judge Advocate General, or why accountability must include the power to transfer without cause. Accordingly, both because of the possibility of early removal from a position as a military judge, and because of the identity of the person who can do the removing, petitioners' rights were violated when they were not tried and their appeals were not heard by judges with the independence that Due Process requires.[8]

III. THE *DE FACTO* OFFICER DOCTRINE IS INAPPLICABLE TO THIS CASE.

In order to fill most governmental positions, federal or state, a series of requirements must be met, some constitutional and some statutory. From time to time, mistakes may be made, such that, when a governmental decision is challenged, the objecting party may argue that the

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[8]Although respondent characterizes petitioners' Due Process claim as one of "implied bias," US Br. 39, our claim is based on a lack of independence, not an absence of impartiality. Neither Article III, nor the statutes cited on pages 27-28 of our opening brief, nor the cases cited on pages 36-37, are principally concerned with bias, in the sense of lack of objectivity. Rather, they are all concerned with assuring that the possibility of removal does not hang over the heads of the decisionmaker like a Sword of Damocles, as was found to be the case in *Bowsher v. Synar*, 478 U.S. 714 (1986), *Wiener v. United States*, 357 U.S. 349 (1958), and *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

person making the decision did not properly hold the necessary office and hence the decision is void. The *de facto* officer doctrine was developed to limit the circumstances in which government actions can be challenged by questioning the title of the officeholder. The principal harm that the doctrine was intended to prevent arises when the attack occurs long after the appointment is made, and the defect is of a technical nature that could have and would have been readily cured had it been called to the government's attention in a timely fashion. The doctrine is not a simple one, as the discussion of the Court of Appeals for the District of Columbia Circuit in *Andrade v. Lauer*, 729 F.2d 1475, 1496-1500 (1984), makes clear. But whatever its reach, no case has applied the doctrine in circumstances remotely resembling those presented here.

We begin with the cases cited on pages 22-24 of respondent's brief, on which it bases its claim that the doctrine prevents this Court from applying the Appointments Clause -- but not the Due Process Clause -- to overturn petitioners' convictions. Most of those cases are civil, not criminal, and the only criminal cases involve collateral attacks on state criminal convictions in federal court. *See United States ex rel. Doss v. Lindsley*, 148 F.2d 22 (7th Cir.), *cert. denied*, 325 U.S. 858 (1945); *Ryan v. Tinsley*, 316 F.2d 430 (10th Cir.), *cert. denied*, 375 U.S. 17 (1963); *see also Ex parte Ward*, 173 U.S. 452, 454 (1899) (doctrine used in criminal case to defeat collateral attack on validity of judge's title to office).

The inapplicability of the doctrine to this case can be seen most easily by examining those cases in which it was *not* applied, but where the doctrine would have provided an easy way to dispose of the case had it been relevant. Thus, in *Freytag v. Commissioner*, 111 S.Ct. 2631 (1991), this Court could have avoided deciding the very difficult question whether the Tax Court was a Court of Law or a Department under the Appointments Clause since the special trial judges there were clearly at least *de facto* officers. Similarly, in

Morrison v. Olson, 487 U.S. 654 (1988), the difficult determination of the constitutionality of the independent counsel would have been unnecessary since, if the doctrine has any utility at all in the criminal context, it surely would have sufficed to have allowed the independent counsel to enforce a grand jury subpoena, which was the specific action challenged there. And, in *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962), which involved both civil and criminal cases, if the *de facto* officer doctrine were available, Justice Harlan would have been able to do what "we find ourselves unable to do," which was "to decide these cases on narrower grounds if any are fairly available." *Id.* at 534. Finally, in *United States v. Woodley*, 751 F.2d 1008 (9th Cir. 1985) (*en banc*), *cert. denied*, 475 U.S. 1048 (1986), the court of appeals divided 7-4 in a direct criminal appeal, before upholding a recess appointment of a district judge in the face of a claim that the appointment was inconsistent with Article III, yet none of the judges even mentioned the *de facto* officer doctrine.

It is possible that all of the Justices, judges, and counsel defending the statutes, including various Solicitors General, in all of these and other cases, such as *Buckley v. Valeo*, 424 U.S. 1 (1976), and *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), simply overlooked the *de facto* officer doctrine, but we doubt it. In our view the failure to mention the doctrine in any of those cases is best explained by its lack of relevance either to a direct attack on a statutory scheme or, as here, when a judge or prosecutor directly involved in a criminal case has allegedly been appointed in violation of the Constitution.

It would be particularly harsh to apply the doctrine in a criminal case involving a structural defect of constitutional dimensions, since almost no one could challenge the practice before being adversely affected by some act of that officer. *See City of Los Angeles v. Lyons*, 453 U.S. 1308 (1981). Indeed, if the doctrine were relevant in these kinds of cases, it would always be the first (and last) question asked,

precluding any ruling on the merits of a constitutional claim because to do otherwise would be to render an advisory opinion. Stated another way, the kind of indiscriminate use of the *de facto* officer doctrine proposed by respondent here, and by the Court of Military Appeals in *Carpenter*, *supra*, would effectively insulate all such claims from judicial review and thereby allow Congress or the Executive to violate even the most explicit prohibitions in the constitution with impunity, knowing that the *de facto* officer doctrine would always prevent a court from setting aside the challenged action.

The only federal criminal case of which we are aware, in which the doctrine was relied on to sustain a conviction on a direct appeal, is *McDowell v. United States*, 159 U.S. 596 (1895). Not only was the doctrine an alternative basis for affirming a conviction, but the facts of *McDowell* are so different from this case as to sap it of all precedential value here. The defect alleged in *McDowell* was that the procedures had not been followed in arranging for an assignment of a duly appointed federal judge from one district to sit in another district. The judge had not presided over the defendant's trial, nor was he present when the grand jury had returned the indictment. Rather, the only defect was that he was presiding when the grand jury was first sworn and impaneled, and even then a properly appointed judge may have re-sworn the grand jurors before the indictment was handed down. Under those circumstances, this Court refused to overturn defendant's conviction for what was at most a highly technical violation of a statute, whose purpose had nothing to do with protecting the rights of defendants or allocating power within the government. And the fact that *McDowell* was cited in *Glidden*, 370 U.S. at 535-36, albeit for a different proposition, makes any claim that the *de facto* officer doctrine was overlooked in *Glidden* even more improbable.

In the final paragraph of this portion of its brief, respondent also urges that, if the Court rules in petitioners'

favor, it should "stay the effectiveness of its ruling for a reasonable period of time" as it has done in other cases, such as *Bowsher, Northern Pipeline*, and *Buckley*. US Br. 24. But all of those cases were civil actions in which the equitable power of the courts could be used to ameliorate the situation until corrections could be made in the laws, whereas this is a criminal case in which petitioners have been severely punished as a result of decisions made by persons who have been appointed in violation of an explicit provision of the Constitution. *See Andrade v. Lauer*, *supra*, 729 F.2d at 1499 n.39. To accept the government's invitation here would reintroduce through the backdoor the concept of prospective rulings in criminal cases that this Court has squarely rejected in *Griffith v. Kentucky*, 479 U.S. 314 (1987).

Finally, the government has claimed that a ruling in petitioners' favor "would have a devastating effect on the operation of the military justice system," US Br. 7, but a number of factors suggest that such forecasts may be based more on the desire to gain tactical advantage than on reality. To be sure, under *Griffith*, the rulings in this case would be applied to all cases now pending on direct appeal "in which the issue has been preserved." US Br. 7. However, because almost everyone convicted of a crime in the military begins serving their sentence immediately, and because many of the periods of confinement imposed are fairly short, many of those affected by the ruling in this case will have already completed serving their sentences by the time that this case is decided. Moreover, for those whose principal interest in continuing their appeal is to remove the stigma of a bad conduct or dishonorable discharge, the Naval Military Personnel Manual ¶ 3420260.6d authorizes administrative discharges, an approach that strikes a reasonable balance in many of these cases and avoids the kind of disruption that the government predicts. *See also* Marine Corps Separation and Retirement Manual ¶ 6203.4 (same).

There is another possible basis for limiting the effect

of this Court's ruling, which the government itself has suggested: the arguable necessity of preserving these objections. Counsel of record is extremely reluctant even to suggest how this argument might apply because he represents only these two petitioners on these claims, and there are individuals who have raised one or both of these claims at various stages of their cases. Their rights surely should not be adjudicated in this proceeding, where they are not represented by their own counsel and where the facts and circumstances of their cases, not to mention their own legal analyses, cannot be advanced by present counsel. Most important of all, these arguments should not be considered in the first instance by this Court, but by the lower military courts, which have the relevant records and the expertise on these issues, and which can hear argument from counsel for the individual defendants.

For these reasons, there is no basis to conclude that the government's apocalyptic fears will materialize, although we anticipate that a ruling in petitioners' favor on either issue will have substantial effects on the military justice system. But if the Constitution has been violated, those who were tried and sentenced under an unconstitutional system have a right to have the courts correct those violations. The military justice system simply cannot disregard the constitutional rights of those charged with crimes under the UCMJ because some defendants may have to be retried or resentenced, or their appeals reargued. The Constitution requires no less.

CONCLUSION

For the foregoing reasons, the judgments of the Court of Military Appeals should be set aside, and the cases remanded for further proceedings consistent with this Court's decision, with directions that the Court of Military Appeals not apply the *de facto* officer doctrine.

Respectfully submitted,

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